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## DUTY OF LIABILITY INSURER TO COMPROMISE LITIGATION

By JOHN A. APPLEMAN\*

Members of the general public often fail to understand the relationship of the insurance company to its policyholders and their mutual rights and duties. The insured pays a premium for protection against legal liability. If an accident occurs, he expects that a complete investigation shall be made of all circumstances surrounding the accident; and, after such investigation is made, if the circumstances disclose that the insured is at fault, then he expects that the case will be compromised and settled out of court, if possible. If a reasonable settlement is not possible, then the insured expects the company to defend any litigation arising therefrom at its own expense and pay any and all judgments recovered, up to the policy limits. These matters, simply stated, constitute the rights and duties arising under the usual form of automobile liability insurance policy.<sup>1</sup>

But, as simple as this matter appears upon surface examination, a closer scrutiny reveals powerful and conflicting undercurrents. In the first place, nearly all accidents result in a conflict of testimony as to the acts of each individual concerned and a definite dispute upon issues of negligence. It is impossible to accurately forecast the verdict of a jury. Suppose, then, the insurance company is confident that the policyholder was not at fault but the jury decides otherwise. Or suppose that the

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<sup>1</sup> In the standard policy, this clause reads as follows: "It is further agreed that as respects insurance afforded by this policy [under coverages A and B] the company shall (a) defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company."

insurer can settle the case for \$8,500 but from past experience knows that in 90% of such cases the jury verdict will not exceed \$5,000, but this particular jury return a verdict of \$15,000. Is the insurer to be penalized for this failure to accurately "call its shots"?

By the terms of one section of the standard liability policy, previously noted, the insurer has the right to compromise or to settle any claims which it may feel advisable. In another section of the policy the right to make any settlements or compromises is unequivocally taken away from the insured.<sup>2</sup> It has been held that the insurance company is not bound to consult the insured's interests in making a settlement.<sup>3</sup> Difficulty seldom arises in connection with the privileges asserted, but rather in relation to the *duty* of the insurer to effect a settlement in a controverted case. No question will arise if a resulting judgment is less than the policy limits. If, however, the judgment exceeds the policy limits the policyholder gets a sharp, sinking sensation in the pit of his stomach and grasps wildly about for some method of preventing his personal financial loss.

Let us look at the matter from the viewpoint of the policyholder, for a moment. He has paid for a certain amount of protection, let us say, \$10,000 and \$20,000 limits. This means that the insurer will pay judgments up to a limit of \$10,000 for any one person injured but will not pay in excess of \$20,000 regardless of the number of persons injured in the accident. The policyholder has an accident in which four or five people are injured. The plaintiff's attorney offers to settle all cases for \$15,000. This seems like a large sum of money to the policy-

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<sup>2</sup>Under the Assistance and Cooperation clause of the standard policy is found: "The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident." See the cases of *Snyder v. National Union Indemnity Co.*, C. C. A. 10th, 65 F. (2d) 844 (1933), cert. denied 291 U. S. 665, 54 S. Ct. 440, 78 L. Ed. 1056; *Universal Auto Insurance Co. v. Culberson*, Tex. Civ. App., 54 S. W. (2d) 1061 (1932).

<sup>3</sup>"An insurance company, under a policy such as the declaration discloses, has an absolute right to dispose of an action brought against its assured and by him turned over to it to defend or, at its option, to settle, in such way as may appear to it for its best interests. It is not bound 'to consult the interest of the assured to the prejudice of its own interests in case of a conflict between the two'; and the fact of protest by the insured is immaterial." *Long v. Union Indemnity Co.*, 277 Mass. 428, 178 N. E. 737 (1931).

holder but he requests the insurer to pay it. After all, it is less than the policy limits so why gamble? By making such a gamble the policyholder may be exposed to the risk of a large excess verdict. The insurer, however, reasons differently. If the policy limits are only \$20,000 it is only gambling an extra \$5,000 as against a certain \$15,000 loss; whereas, if the cases are battled, they may result in a defendant's verdict or a total judgment of only \$6,000 or \$7,000. This is certainly not unusual. Certainly this illustration serves to point out the sharp conflict of interests between the parties. Each party is looking out solely for himself, and the true cause of justice must be to find some doctrine or rule of law which will most adequately protect the interests of both parties in the majority of cases. Let us examine the present status of the law as to the existence of some sound principle in this regard.

As a general proposition, it is admitted that the insurance company has absolute authority to make any settlement within the policy limits. The insured can neither force the insurer to make a settlement nor can he prevent the company from compromising claims or litigation.<sup>4</sup> If the settlement proposed is one in excess of the policy limits, and it is expected that the insured will pay such additional amount, the consent of the insured must first be had.<sup>5</sup>

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<sup>4</sup>"The insurance contract between defendant and the company is an indemnity contract. The reason why absolute authority is given the insurer in the matter of settlements with claimants against the insured is obvious. And the authority of the insurer as to this is absolute. *Best Building Co., Inc. v. Employers' Liability Assur. Corp., Ltd.*, et al., 247 N. Y. 451, 160 N. E. 911, 71 A. L. R. 1464. The insured cannot compel the insurer to settle nor prevent it from doing so." *Countryman v. Breen*, 241 App. Div. 392, 271 N. Y. S. 744 (1934). See also *New Amsterdam Casualty Co. v. East Tennessee Telephone Co.*, C. C. A. 6th, 139 Fed. 602 (1905), *New Orleans & C. R. Co. v. Maryland Casualty Co.*, 114 La. Sup. 153, 38 So. 89 (1905); *Long v. Union Indemnity Co.*, 277 Mass. 428, 178 N. E. 737 (1931); *Silverstein v. Standard Accident Ins. Co.*, 175 App. Div. 639, 162 N. Y. S. 601 (1916); *Auerbach v. Maryland Casualty Co.*, 263 N. Y. 247, 140 N. E. 577 (1923); *Schmidt & Sons Brewing Co. v. Travelers Ins. Co.*, 244 Pa. 286, 90 Atl. 653 (1914).

<sup>5</sup>"Thus the obligation of the insurance company was to defend the suit in the name of the assured, or 'settle same'. The contract does not contain any provision in respect to how or through what agency the insurance company should either defend or settle. Those were matters for its own determination. It might settle the suit through its attorneys, or through some local or general agent, or by some agent specially appointed. It was a corporation, and could act only through some agency. The assured was not at all concerned, provided the set-

In accordance with the above doctrine, it has been stated that the contract must be enforced according to its terms. Consequently, if no principle of public policy is violated, there is no liability on the part of the insurer at all for failure to make a settlement.<sup>6</sup> And if the insured voluntarily makes a settlement without written consent of the insurer, the company is under no obligation to reimburse him for this expense.<sup>7</sup>

What, then, is the nature of the obligation of the insurance company with reference to the making of a settlement? It has been often contended by litigants that the insurance company is under a duty to elect—either to compromise a case if it can be accomplished within the policy terms, or to defend, and, if it elects to defend it assumes all risk of the judgment exceeding the policy limits. Every court considering this question has held that the mere refusal to settle a case does not of itself increase the limits of the policy so as to bind an insurer for a judgment in excess of the policy limits.<sup>8</sup> Some courts have refused to

tlement did not exceed the indemnity for which the insurer was liable, as to how or by whom it should settle any suit it was contractually bound to defend or settle. This defense it was to make in the name of the assured, and implied an obligation to defend in good faith. Inasmuch as its own liability was limited it was bound to take care that no unnecessary liability was cast upon the assured by a negligent defense. So with its obligation to settle. So long as it should settle within the limit of its contractual obligation, the assured was not concerned. But a settlement in excess of that would require the consent of the assured, who would have to pay the excess. To enable the insurance company to defend or settle, the assured was required, upon request, 'to aid in securing information and evidence and in effecting settlements'. But this was the extent of the right of the assured in the matter of settlements, unless it should make a settlement of its own on volition. In this case it could not call upon the insurer for reimbursement unless its action in settling a claim was done with the consent of the insurer 'previously given in writing.' New Amsterdam Casualty Co. v. East Tennessee Telephone Co., C. C. A. 6th, 139 Fed. 602 (1905).

<sup>6</sup> Rumford Falls Paper Co. v. Fidelity & Casualty Co., 92 Me. 574, 43 Atl. 503 (1899).

<sup>7</sup> New Amsterdam Casualty Co. v. East Tennessee Telephone Co., C. C. A. 6th, 139 Fed. 602 (1905); Thatcher v. Aetna Accident & Life Co., C. C. A. 8th, 287 Fed. 484 (1923); Kesinger v. Commercial Standard Ins. Co., 70 P. (2d) 776 (Colo., 1937).

<sup>8</sup> "The only suggestion of a tortious act is in the language used with reference to the defendant's negligently refusing to settle the Jones claim for \$1,000 or \$2,500. A casual examination of the policy makes it clear that the parties agreed that the defendant should have the sole right to compromise and settle claims brought against the plaintiff. There is no allegation that this power was exercised by the defendant fraudulently, oppressively, or otherwise than in good faith. That provision was evidently placed in the contract for the protection of the insurer and gives the insurer the right to exercise its own judg-

impose liability upon the insurer, rejecting in toto contentions made by the insured—and the strength of the language used made it appear that even fraud or bad faith would not create a liability for such failure. Undoubtedly, those decisions were merely worded without considering possible consequences, and equity would always consider the element of fraud, if an action of quasi-contract were maintained. At any rate all courts now agree that under certain circumstances liability may be imposed upon the insurer for failure to compromise. Let us see what circumstances must be shown.

### RULE OF BAD FAITH

The old majority rule which is now rapidly becoming the minority rule holds that in order for the insured to recover against the company for failure to settle he must show actual fraud or bad faith on its part.<sup>9</sup> It is not sufficient that there

ment as to when a compromise and a settlement shall be made. Of course, it must be exercised in good faith and without any wrongful or fraudulent purpose. When properly exercised, it is binding upon the insured. It turns out that it would have been better for all parties, the plaintiff as well as the defendant, if the offer of a compromise had been accepted, but, as is said in the brief of the counsel for the defendant, 'This is a case where hindsight turns out to be better than foresight.' It was a mistake of judgment, something not unusual in the affairs of this life. Such a mistake, honestly made, does not subject the person to legal liability." *Wynnewood Lumber Co. v. Travelers Ins. Co.*, 173 N. C. 269, 91 S. E. 946 (1917). See also *Kingan & Co. v. Maryland Casualty Co.*, 65 Ind. App. 301, 115 N. E. 348 (1917); *Georgia Casualty Co. v. Mann*, 242 Ky. 447, 46 S. W. (2d) 777 (1932); *Schenke Piano Co. v. Philadelphia Casualty Co.*, 216 N. Y. 687, 110 N. E. 1049 (1915); *Auerbach v. Maryland Casualty Co.*, 236 N. Y. 247, 140 N. E. 577 (1923); *Best Building Co. v. Employer's Liability Assur. Co.*, 247 N. Y. 451, 160 N. E. 911 (1928); *Schmidt & Sons Brewing Co. v. Travelers Ins. Co.*, 244 Pa. 286, 90 Atl. 653 (1914).

<sup>9</sup>"Some of the cases hold that the insured is entitled to recover upon proof that the insurer in refusing to settle a claim for damages was guilty of negligence. In so far as any standard of due care may be applied to the exercise of an honest judgment in accepting or refusing an offer of compromise, the test is rejected in the better reasoned cases, and we think rightly so. The practical difficulties in applying such standard are at once suggested by the rhetorical question in the *Best Building Co.* case, *supra*, 'We may ask what would constitute negligence in the failure to settle a case, as distinguished from bad faith', and by the laconic observation of the Kentucky Court in *Georgia Casualty Company v. Mann*, 242 Ky. 447, 46 S. W. (2d) 777, 779, 'The gift of prophecy has never been bestowed on ordinary mortals.'" *Noshey v. American Automobile Ins. Co.*, C. C. A. 6th, 68 F. (2d) 808 (1934).

See also *American Mutual Liability Ins. Co. v. Cooper*, C. C. A. 5th, 61 F. (2d) 446 (1932), this decision approving the test of bad faith, but specifically reserves passing upon the test of negligence; *Bartlett*

might be danger of an excessive verdict, or that the question of liability was one closely controverted. It is not sufficient that hindsight reveals that a settlement would have been wise, nor even that foresight suggests it to some extent. The insured has no right to assume that the insurance company is blessed with a gift of prophecy so as to fortell the result of a hard-fought case.<sup>10</sup> Nor is the insurer required to assume the plaintiff's witnesses will be believed in preference to its own.<sup>11</sup> While a test

v. Travelers Ins. Co., 117 Conn. 147, 167 Atl. 180 (1933); Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 S. W. (2d) 777 (1932); Davis v. Maryland Casualty Co., 16 La. App. 253, 133 So. 769 (1931); City of Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N. W. 643 (1929); Mendota Electric Co. v. New York Indemnity Co., 169 Minn. 377, 211 N. W. 317 (1926); Georgia Casualty Co. v. Cotton Mills Products Co., 159 Miss. 396, 132 So. 73 (1931); Schenke Piano Co. v. Philadelphia Casualty Co., 216 N. Y. 662, 110 N. E. 1049 (1915); Auerbach v. Maryland Casualty Co., 236 N. Y. 247, 140 N. E. 577 (1923); Best Building Co. v. Employer's Liability Assur. Co., 247 N. Y. 451, 160 N. E. 911 (1923); Wynnewood Lumber Co. v. Travelers Ins. Co., 173 N. C. 269, 91 S. E. 946 (1917); Johnson v. Hardware Mutual Casualty Co., Vt., 187 Atl. 788 (1936); Wisconsin Zinc Co. v. Fidelity & Deposit Co., 162 Wis. 39, 155 N. W. 1081 (1916), this result having been changed by later cases.

<sup>10</sup> "In order to deal with the question from a more practical point of view, let us suppose that in this very case the insurance company had authorized its local counsel to defend or settle. Would it be contended for a moment that, although he exercised an honest judgment after ascertaining the facts, the company could recover of him the excess over what the case could have been compromised for on the ground that he failed to make the right choice? Clearly not. The gift of prophecy has never been bestowed on ordinary mortals, and as yet their vision has not reached such a state of perfection that they have the power to predict what will be the verdict of the jury on disputed facts in a personal injury case. The verdict represents the composite judgment of the assenting jurors, and oftentimes is but the resultant expression of conflicting views. Common experience teaches us that, even where the injuries would justify a more substantial verdict, some of the jurors, doubting whether there is any liability at all, are not willing to go that far, but insist on the verdict as returned. Calling it negligence for an agent not to divine what would be the result of a jury trial on disputed evidence, and permitting a jury to determine the question not solely on the facts as presented to him, but in the light of the subsequent verdict of the jury, would carry his responsibility beyond the bounds of reason and further than the demands of justice require. There is no reason why a different rule should apply to the case in hand. The facts were investigated, the evidence on the question of liability was conflicting, and the most that can be said is that, in refusing to settle, the insurance company committed a mere error of judgment for which it cannot be held liable." Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 S. W. (2d) 777 (1932).

<sup>11</sup> "We may ask what would constitute negligence in the failure to settle a case, as distinguished from bad faith. Even when there was little likelihood of recovery many reasonable persons would think it wise to settle rather than to take any chance with a jury. In most of the accident cases, disputed questions of fact arise. Is the insurance

of negligence might be perfectly legitimate theoretically, the test of bad faith seems one more capable of practical administration. If the insurer believes it can defeat a claim for damages, it certainly is not bad faith to defend rather than to compromise even though a timid person might be inclined to settle.<sup>12</sup>

If the insured does bring suit against the insurer alleging fraud or bad faith in its refusal or failure to settle, then the burden rests upon the insured to prove such allegations. At no time is this burden shifted to the company.<sup>13</sup> It has been held that bad faith may be shown where the insurer appeals after judgment where the case could have been settled within the policy limits.<sup>14</sup> This is clearly not the majority rule, as will be later seen.

#### RULE OF NEGLIGENCE

The application and scope of the rule of negligence is somewhat difficult to distinguish from that of bad faith. The best way to make the distinction is probably somewhat as follows: Under the rule previously discussed the intention of the insurer must be bad—involving a fraudulent intent or bad faith. Under the rule now presented this intention may be entirely lacking. The courts hold that the insured surrenders a valuable right to the insurance company by permitting it to assume entire control of the defense of an action and over negotiations for settlement. By so divesting himself of this privilege, he is entitled to expect something in return. He is entitled to expect

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company to determine at its peril whether reasonable-minded men would believe the plaintiff's witnesses in preference to its own? Again, even on conceded facts, as frequently happens, a serious question of law arises as to the nature or extent of liability, if any. Is a jury to say that the insurance company was guilty of negligence in choosing to try out such a question in the courts rather than to settle? These questions suggest the wisdom of adhering to the contract of insurance which the parties have made. If the insurance company is to be obligated to make a settlement under any given circumstances, it must be a matter to be dealt with between the insured and the insurer, or else regulated by the Legislature." *Best Building Co. v. Employers Liability Assur. Corp.*, 247 N. Y. 451, 160 N. E. 911 (1928).

<sup>12</sup>*City of Wakefield v. Globe Indemnity Co.*, 246 Mich. 645, 225 N. W. 643 (1929).

<sup>13</sup>*Getchell & Martin Lumber Co. v. Employer's Liability Assur. Co.*, 117 Ia. 180, 90 N. W. 616 (1902); *City of Wakefield v. Globe Indemnity Co.*, 246 Mich. 645, 225 N. W. 643 (1929); *Johnson v. Hardware Mutual Casualty Co.*, Vt., 187 Atl. 788 (1936).

<sup>14</sup>*Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S. C. 286, 170 S. E. 346 (1933).



that the company will not only act in good faith but that it will use due care and caution in negotiations and in settlement. If, under the circumstances, a reasonable man would settle the case rather than risk a trial the insurer would be guilty of negligence by acting otherwise.<sup>15</sup>

<sup>15</sup> "Terms which are not strictly convertible or synonymous have been used by different courts to indicate the same thing. Negligence has been used by some courts to mean the same thing that other courts have designated as bad faith. Bad faith, especially, is a term of variable significance and rather broad application. Generally speaking, good faith means being faithful to one's duty or obligation; bad faith means being recreant thereto. In order to understand what is meant by bad faith, a comprehension of one's duty is generally necessary, and we have concluded that we can best indicate the circumstance under which the insurer may become liable to the insured by failure to settle by giving with some particularity our conception of the duty which the written contract of insurance imposes upon the carrier.

"In express terms the contract imposes no duty at all a breach of which makes the insurer liable to the insured for a failure to settle or compromise a claim. However, all courts are agreed that the insurer does owe to the insured some duty in this respect. This duty is implied as a correlative duty growing out of certain rights and privileges which the contract confers upon the insurer. By the terms of this contract the absolute control of the defense of such actions is turned over to the insurer, and the insured is excluded from any interference in any negotiations for settlement or legal procedure. It is generally understood that these are rights and privileges which it is necessary for the insurer to have in order to justify or enable it to assume the obligations which it does in the contract of insurance. So long as the recovery does not exceed the limits of the insurance, the question of whether the claim be compromised or settled, or the manner in which it shall be defended, is a matter of no concern to the insured. However, where an injury occurs for which a recovery may be had in a sum exceeding the amount of the insurance, the interest of the insured becomes one of concern to him. At this point a duty on the part of the insurer to the insured arises. It arises because the insured has bartered to the insurance company all of the rights possessed by him to enable him to discover the extent of the injury and to protect himself as best he can from the consequences of the injury. He has contracted with the insurer that it shall have the exclusive right to settle or compromise the claim, to conduct the defense, and that he will not interfere except at his own cost and expense. It is quite apparent that this right was given to the insurance company to induce it to enter into the contract of insurance, and that it is a necessary right to be possessed by it if it is to write the insurance upon the terms stipulated. It is a right to be exercised by the insurer in its own interest.

"It is the right of the insurer to exercise its own judgment upon the question of whether the claim should be settled or contested. But because it has taken over this duty, and because the contract prohibits the insured from settling, or negotiating for a settlement, or interfering in any manner except upon the request of the insurer, such as assisting in the securing of witnesses, etc., its exercise of this right should be accompanied by considerations of good faith. Its decision not to settle should be an honest decision. It should be the result of the weighing of probabilities in a fair and honest way. If upon such

This argument is not without merit. The policy of insurance is supposedly designed solely for one purpose—that is, for the protection of the policyholder. An insurance company should not be permitted to gamble with his financial security merely because it cannot beat the settlement down to a point where it desires to settle. Assume that the limit of liability is \$5,000. If the insurer knows that the injuries are very bad and that the chances are ten to one a verdict will be recovered, it is clearly negligent in spurning an offer of \$4,500 where the verdict may run from \$8,500 to \$25,000. There is, in such a case, which arises on thousands of occasions, good reason to say that the insurer does not act in good faith because of such negligence—regardless of the real intention of the company's representative.

The consistency of this rule is evident when it is considered that the insurer may be held liable for negligence in conducting a defense. If it fails to exercise due care in the conduct of the defense and handles it in such a negligent and unskillful manner

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consideration it decides that its interest will be better promoted by contesting than by settling the claim, the insured must abide by whatever consequences flow from that decision. He has so agreed. But, as already stated, such decision should be an honest and intelligent one. It must be honest and intelligent if it be a good-faith conclusion. In order that it be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained.

"This requires the insurance company to make a diligent effort to ascertain the facts upon which only an intelligent and good-faith judgment may be predicated. If it exhausts the sources of information open to it to ascertain the facts, it has done all that is possible to secure the knowledge upon which a good-faith judgment may be exercised. But we do not go so far as to say that, in order to characterize its judgment as one of good faith, it is necessary that it should absolutely exhaust all sources of information. We go only so far as to say that it should exercise reasonable diligence in this behalf, which means such diligence as the great majority of persons use in the same or similar circumstances. This is ordinary care. So it seems to us that the statement in the opinion, which is criticised, to the effect that a good-faith decision on the part of the insurance company upon the question of settlement must be preceded by the exercise of that degree of care and diligence which a man of ordinary care and prudence would exercise in the investigation and adjustment of claims, states the duty devolving upon the insurer, just as we declare it to be." *Hilker v. Western Automobile Ins. Co. of Ft. Scott, Kansas*, 204 Wis. 1, 235 N. W. 413 (1931).

"It may be stated as a rule of law that where an insurance company agrees to indemnify against loss from personal injury claims, conditioned upon insured's surrendering to the insurance company control of investigations, adjustments of claims, and defenses of lawsuits, and

that a large verdict is returned against the insured, courts have permitted a recovery.<sup>16</sup>

The real difficulty in this test lies in one proposition, and that, to the writer, totally destroys its efficacy. It is unworkable in actual practice. The question is submitted to a jury of 12 men, none of whom have any legal training whatsoever, nor any experience of any nature with insurance claims or litigation. Under the circumstances those men are totally incompetent to say whether or not a certain offer of settlement was reasonable. They are incompetent to estimate the probable chances of recovery. In no sense of the word could any of those men be considered a judge capable of analyzing the actions of the company to determine whether or not under the circumstances negligence was shown. To submit such a proposition to a body of unqualified and untrained men is not only grossly unjust and inequitable, but it amounts to making a new contract for the parties. There can be no practical justification for the operation

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where the insurance company does, pursuant to such contract, take control of such matters, a relationship arises between insured and insurer which imposes on the insurer the duty owing to the insured to exercise skill, care, and good faith to the end of saving the insured harmless, as contemplated by the contract to indemnify. The insurer must act honestly to effectually indemnify and save the insured harmless as it has contracted to do—to the extent, if necessary, that it must make whatever payment and settlement an honest judgment and discretion dictate, within the limits of the policy, and an abandonment of this duty to act subsequent to its assumption in part constituted bad faith." *Boling v. New Amsterdam Casualty Co.*, 173 Okla. 160, 46 P.2d 916 (1935).

See also *Commercial Casualty Ins. Co. v. Fruin-Colnon Contracting Co.*, C. C. A. 8th, 32 F. (2d) 425 (1929); *Maryland Casualty Co. v. Cook-O'Brien Construction Co.*, C. C. A. 8th, 69 F. (2d) 462 (1934); *Ballard v. Ocean Accident & Guaranty Co.*, C. C. A. 7th, 86 F. (2d) 449 (1936); *Atteboro Manufacturing Co. v. Frankfort Marine Ins. Co.*, 240 Fed. 573 (1917); *Bartlett v. Travelers Ins. Co.*, 117 Conn. 147, 167 Atl. 180 (1933); *Hoyt v. Factory Mutual Liability Ins. Co. of America*, 120 Conn. 156, 179 Atl. 842 (1935); *Cavanaugh Bros. v. General Accident, Fire & Life Assurance Co.*, 79 N. H. 186, 106 Atl. 604 (1919); *Douglas v. United States Fidelity & Guaranty Co.*, 81 N. H. 371, 127 Atl. 708 (1924); *Street Coal Co. v. Frankfort General Ins. Co.*, 237 N. Y. 60, 142 N. E. 352 (1923), although this case has probably been overruled by more recent decisions; *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S. C. 286, 170 S. E. 346 (1933); *Aycock Hosiery Mills v. Maryland Casualty Co.*, 157 Tenn. 559, 11 S. W. (2d) 889 (1928); *Universal Automobile Ins. Co. v. Culberson*, Tex. Civ. App., 54 S. W. (2d) 1061 (1932).

<sup>16</sup>*Ballard v. Ocean Accident & Guaranty Co.*, C. C. A. 7th, 86 F. (2d) 449 (1936); *Kingan & Co. v. Maryland Casualty Co.*, 65 Ind. App. 301, 115 N. E. 348 (1917); *Aycock Hosiery Mills v. Maryland Casualty Co.*, Tenn., 11 S. W. (2d) 889 (1928); *Schwartz v. Norwich Union Indemnity Co.*, 212 Wis. 593, 250 N. W. 446 (1933).

of the rule and it is to be hoped that it will be extended no court, more justification would appear. Even in that situation, further. If it were handled entirely as a matter of law by the however, the average judge has no experience with casualty claims or litigation and has no basis upon which to form a sound judgment. It must be remembered that an insurance company will not gamble without justification—and an incident of the type referred to would create ill will, and serve as sales ammunition to representatives of other companies. That alone serves as an effective check upon any negligent propensities, and the right to contest controverted issues should not be further restricted.

There is no serious question that the propositions of either bad faith or negligence are for the jury to determine.<sup>17</sup> The writer challenges the competency of the jury to decide this issue. Of course, if there is no real evidence of negligence, the court will direct a verdict for the insurer. It has been held evidence of negligence to delay acting upon an offer of compromise submitted by the plaintiff until that offer is withdrawn.<sup>18</sup>

The split in authority among the various Federal courts may appear somewhat confusing to the reader. As a matter of fact, one Federal case has stated that it feels the rule established in the state where it is located is to be followed.<sup>19</sup> That may account in part for the distinction. Another reason may lie in

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<sup>17</sup> "Defendant earnestly contends that there is no proof of negligence on its part in and about the negotiations for compromise and settlement and the defense of the action. We think there was proof sufficient to take the case to the jury, to be found in the letters pertaining to the various offers and counter-offers of settlement and in the testimony of T. S. Adams. The force of that evidence was solely a question for the jury. It was not, therefore, error to refuse to direct a verdict on this ground.

"Defendant further contends that there is no proof of the allegation that defendant acted in bad faith in its conduct of the negotiations for settlement and its conduct of the defense. This, too, was a question for the jury to decide. It heard all the testimony, and might well be left to decide whether the letters and oral testimony showed that defendant conducted the negotiations with an eye solely to its own interests and in disregard of plaintiff's rights and interests." *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S. C. 286, 170 S. E. 346 (1933). See also *Maryland Casualty Co. v. Cooke-O'Brien Construction Co.*, C. C. A. 8th, 69 F. (2d) 462 (1934); *Lanferman v. Maryland Casualty Co.*, 'Wis., 267 N. W. 300 (1936).

<sup>18</sup> *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S. C. 286, 170 S. E. 346 (1933).

<sup>19</sup> *Ballard v. Ocean Accident & Guaranty Co.*, C. C. A. 7th, 86 F. (2d) 449 (1936).

the fact that the minority view is supported by language in these cases which is, in reality, very little different from the majority result—inasmuch as the court finds bad faith to exist where due care is not observed.

Here we have two tests enunciated the courts. Each has been bitterly attacked by writers and by judges. There is little distinction to be found in some decisions which apparently regard both tests to have the same essential elements. The one real point of vulnerability is existent under both—that is, the consideration of the question as a jury issue. No jury whatsoever is competent to consider such an issue when even attorneys, expert in the fields of personal injury and insurance law, might well differ upon the the questions of due care by or good faith of the insurer in such a situation. A group of laymen, casually assembled, is absolutely incompetent to apply either test accurately; and a group of laymen will always be biased in favor of a plaintiff, who is likewise a layman, as against an insurance company.

The writer has no fault to find with either theory, as such. Which test is applied must depend upon the feeling of the courts in the particular jurisdiction in question. The one real improvement which the courts could make in this regard is to treat the question as one of law, wherever possible, rather than one of fact. If no bad faith is shown and no negligence displayed, then the matter was purely a discretionary one, and the fact that the insurer guessed wrong should have no effect whatsoever upon the issue. As the courts of Kentucky have so aptly declared: "The gift of prophecy has never been bestowed on ordinary mortals, and as yet their vision has not reached such a state of perfection that they have the power to predict what will be the verdict of the jury upon disputed facts in a personal injury case." If courts will refuse to shunt matters of this nature to a jury where there is little or no evidence to support a verdict, and will courageously express themselves upon these questions of law then equity and justice will be worked toward all parties. When, as in many cases, it appears that the insurer gambled unfairly with the policyholder's chances a verdict could likewise be directed for the plaintiff as a matter of law. Only by direct and fearless action of the courts themselves can fair and equitable results be reached.